Supreme Court, U.S.
FILED

96 470 SEP 23 1996

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1995

SOPHIE STARZENSKI, KAZMER STARZENSKI and GENNIE STARZENSKI,

Petitioners,

vs.

CITY OF ELKHART, RICHARD L. MOORE, STREET COMMISSIONER, RAYMOND H. MINEGAR, CODE ENFORCEMENT OFFICER AND PRESIDENT, LEROY BERRY, JR., CITY OF ELKHART HEARING OFFICER and HEALTH AND SANITATION COMMISSION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. COHEN
Counsel of Record
Attorney for Petitioners
221 West Lexington Avenue
Elkhart, Indiana 46516
(219) 293-4511

9461-2
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

42 pp.

QUESTIONS PRESENTED

1. Whether the District Court should have retained jurisdiction of this case, which involved important federal questions, while a parallel state case was pending in the state appellate process.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	1
United States Constitution Involved	1
Statement of the Case	3
A. Constitutional Issues First Raised	4
Reasons for Granting the Writ	5
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)	5
Ingersoll Mills Machine Co. v. Granger, 833 F.2d 680 (7th Cir. 1987)	5

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 3, 4

United States Constitution Cited:

Article IV § 1 1

Fourth Amendment 1, 2

Fifth Amendment 1, 2

Fourteenth Amendment 1, 2

APPENDIX

Appendix A — Judgment of the United States Court of Appeals for the Seventh Circuit Decided June 25, 1996 ..... 1a

Appendix B — Memorandum and Order of the United States District Court, Northern District of Indiana Dated February 27, 1995 ..... 17a

OPINIONS BELOW

Petitioners, Sophie Starzenski, Kazmer Starzenski and Genie Starzenski (hereinafter referred to as the "home-owners"), appeal the decision of the United States Court of Appeals for the Seventh Circuit, dated June 25, 1996 and reported at 87 F.3d 872.

STATEMENT OF JURISDICTION

This appeal is being docketed in this Court within ninety (90) days of the entry of judgment by the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

There was a parallel state court case. On August 29, 1996, the Petitioners filed a Petition for Writ for Certiorari to this Court of the parallel state case with the Clerk of this Court where it was docketed September 6, 1996 as Case No. 96-350.

UNITED STATES CONSTITUTION INVOLVED

This case involves the following constitutional provisions: Article IV § 1 of the United States Constitution and the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

Article IV § 1 provides that:

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may be general Laws prescribe the manner in which such acts, Records and Proceedings shall be proved, and the Effect thereof.

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

The Fourteenth Amendment provides that:

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

> immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners appeal the District Court's dismissal of their 42 U.S.C. § 1983 action. On June 11, 1993, the Petitioners filed this civil action alleging the Respondents violated their constitutional rights when they entered Petitioners' home on February 8, 1993 and cleaned it out without a judicial warrant. The Petitioner, Sophie Starzenski, brought a separate action, alleging her arrest at her home while protesting the clean-up violated her constitutional rights. Petitioners appealed the District Court dismissal to the Seventh Circuit, and the Seventh Circuit affirmed. Petitioners seek this Court's review of that decision. The District Court dismissed after a decision had been made in a companion case in state court. The state court case is now pending in this Court as Case No. 96-350 (herein the state court case).

The state court case, Case No. 96-350, arose on February 8, 1993 when Petitioners filed a complaint in state court seeking a temporary restraining order prohibiting Respondents from continuing a "clean-up" of her property because the Respondents did not have a judicial warrant to remove everything inside Petitioners' home. The facts of the state proceeding are more fully discussed in the Petition for Writ of Certiorari filed in Case No. 96-350 and those facts are adopted and incorporated herein.

While Case No. 96-350 was pending in state court, on June 11, 1993, Petitioners filed this case for damages in the United

States District Court for the Northern District of Indiana pursuant to 42 U.S.C. § 1983.

The state court case (Case No. 96-350) reached its conclusion before the federal case. Although the state trial judge found the City's actions "reprehensible", it found that neither the Indiana Constitution, nor the United States Constitution, required a judicial warrant before the City could enter Petitioners' home.

Based on the state court's decision, the Respondents filed a motion with the District Court to dismiss the federal case. The Respondents argued that *res judicata* barred relitigation of the constitutional issues decided by the state court, a position conceded by Petitioners. The Respondents further argued that the District Court should dismiss this case despite the pending appeal in state court. The Petitioners argued that the federal action should be stayed pending completion of the state appeal process. On February 25, 1995, the District Court dismissed this case.

Petitioners request a consolidation of this case with Case No. 96-350 in order to provide Petitioners with complete relief under the law.

A. Constitutional Issues First Raised

All constitutional issues raised herein were first presented to the District Court. In the companion state court case, Case No. 96-350, all constitutional issues were first presented before the state court.

REASONS FOR GRANTING THE WRIT

Petitioners do not dispute that *res judicata* prevents relitigation in federal court of the issues decided in state court. Instead, this case presents a more narrow, but immensely important question, about how federal District Courts should handle a federal case while a parallel state proceeding is pending on appeal.

While in general the decision to stay the proceedings or dismiss a case is left to the sound discretion of the District Court, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), this Court should, through the invocation of its supervisory powers over federal courts, create a nationwide rule preventing any federal district court from dismissing a federal claim as long as a companion state court decision is still in the appellate process.

That is the approach that the Seventh Circuit Court of Appeals had strongly recommended in a virtually identical procedural setting. In *Ingersoll Mills Machine Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987), the Seventh Circuit Court of Appeals outlined the benefits to all parties and the advancement of justice that such a measured rule as advocated by Petitioners would create. Indeed, there is a conflict in the Seventh Circuit which this Court should resolve because the decision in this case conflicts with *Ingersoll Mills Machine v. Granger, supra*.

Petitioners contend that the District Court should have granted a stay of its proceedings until the entire state court appeals process, including a petition for writ of certiorari to this Court, as in Case No. 96-350, was exhausted. Utilizing its supervisory powers, this case presents this Court with the opportunity to make justice more consistent in both state and federal proceedings. Furthermore, what occurred to Petitioners

in this case is likely to recur. And, allowing District Courts discretion to either dismiss or stay its proceedings could result in inconsistent decisions, or the truncation of important constitutional rights. On the other hand, to grant certiorari in this case and consolidate it with Case No. 96-350 could eliminate unnecessary litigation in future cases such as was required in this case by Petitioners' appeal to the Seventh Circuit and then to this Court. If this Court adopts the rule proposed by Petitioners, important constitutional claims may be heard instead of lost and unnecessary litigation can be avoided in the future.

CONCLUSION

WHEREFORE, Petitioners request that this Court grant their Petition for Writ of Certiorari, and consolidate this case with Case No. 96-350, and for all other relief proper in the premises.

Respectfully submitted,

WILLIAM J. COHEN
Attorney for Petitioners
221 West Lexington Avenue
Elkhart, Indiana 46516
(219) 293-4511

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 25, 1996

In the

United States Court of Appeals
For the Seventh Circuit

No. 95-1766

SOPHIE STARZENSKI, KAZMER STARZENSKI, and GENNIE STARZENSKI,

Plaintiffs-Appellants,

v.

CITY OF ELKHART, ELKHART HEALTH AND SANITATION DEPARTMENT,. LEROY ROBINSON, Director of Health and Sanitation Department, RAY MINEGAR, Health Enforcement Officer, FRAN CURRY, Health Enforcement Officer, RICHARD L. MOORE, Street Commissioner, and LARRY KASA, Elkhart City Police Officer,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 93 C 401 —**Allen Sharp,** *Chief Judge.*

ARGUED NOVEMBER 7, 1995-DECIDED JUNE 25, 1996

Appendix A

Before POSNER, *Chief Judge*, COFFEY, *Circuit Judge*, and SKINNER, *District Judge*.*

COFFEY, *Circuit Judge*. Sophie Starzenski, Kazmer Starzenski, and Gennie Starzenski filed a civil rights action pursuant to 42 U.S.C. § 1983, claiming that the defendants violated their Fourth and Fourteenth Amendment rights by entering onto real property that they owned and seizing their personal property without a warrant. Additionally, Sophie Starzenski claimed that the Elkhart Police Sergeant Ernie Hill arrested her without probable cause and used excessive force to effect the arrest. The district court entered summary judgment in favor of all the defendants. The plaintiffs appeal; we affirm.

I. BACKGROUND

Sophie, Kazmer, and Gennie Starzenski own a residence at 1015 W. Garfield, Elkhart, Indiana. In the summer of 1991, city employees had observed extensive trash and debris both inside and outside the Starzenski's residence.

In July 1991, the City of Elkhart held a hearing and ordered Sophie Starzenski to clean the exterior of her property. Thereafter, in September 1992, the city determined that Starzenski had failed to comply with this order, triggering a response by the building commissioner, Leroy Robinson. The commissioner executed a "notice order to take action" and mailed it to the plaintiffs.[1] On October 29, 1992, a hearing was

---

* The Honorable Walter Jay Skinner, Judge of the United States District Court for the District of Massachusetts, sitting by designation.

1. This order was also published in *The Elkhart Truth*, the local weekly newspaper, on September 29, 1992 and October 6, 1992.

conducted before City of Elkhart Hearing Officer Lee Roy Berry, Jr., pursuant to the Indiana Unsafe Building Act, Ind. Code § 36-7-9, *et seq.* At the conclusion of the hearing, Officer Berry ordered the plaintiffs to remove debris from both inside and outside the house within fifteen days, and further, if the trash was not removed within that time limit, the city had the authority to go onto the premises, enter the residence, and remove the trash and debris.

In December 1992, volunteers led by an Elkhart police officer attempted to clean the plaintiffs' premises. However, city officials determined that these efforts failed to satisfactorily clean the property. On February 3, 1993, the Elkhart Health and Sanitation Department voted unanimously to clean the plaintiffs' property on February 8, 1993. Plaintiff Sophie Starzenski received notice of this decision on Friday February 5, 1993.

Sophie Starzenski alleged that when she received notice of the planned clean-up, she attempted to contact city officials. However, the city offices had closed for the weekend. On Monday, February 8, 1993, defendant Richard Moore, the Street Commissioner, called defendant Captain Larry Kasa of the Elkhart Police Department and, although not requesting that a law enforcement officer be present, informed him of the intended clean-up at the plaintiffs' property. Kasa told Lieutenant Paul Petgen, of the Elkhart Police Department, about the clean-up. In his deposition, Kasa testified that he did not instruct Petgen to send an officer to the clean-up site.

Petgen informed Sergeant Hill about the clean-up. Hill went to the site at approximately 8:00 A.M. and observed that workers were in the process of removing the trash and debris

from the grounds. Plaintiff Sophie Starzenski was at the premises and in Hill's presence voiced her objections to the clean-up. Sophie Starzenski left the site to confer with her attorney.

Sometime thereafter, Sophie Starzenski returned and continued to protest the clean-up. Sergeant Hill called Captain Kasa and requested that he come to the residence to assist. Upon arriving, Kasa told Sophie that she should either stand back and watch, or leave. She left the premises, but returned. At that point, according to Hill's arrest report, Sophie shouted at the workers "get off my property you thieving bastards." When Hill advised her to quiet down, Sophie repeated the above statement and Hill arrested her for disorderly conduct.

Later on the same day (February 8, 1993), the plaintiffs' lawyer obtained a temporary restraining order from the Elkhart Superior Court. The order directed the city to stop the clean-up at 1015 W. Garfield pending a hearing for a preliminary injunction. On February 17, 1993, the Elkhart Superior Court conducted a hearing at Sophie Starzenski's request for a preliminary injunction. On May 4, 1993, the Elkhart Superior Court ruled that neither Indiana Law nor the Fourth Amendment of the United States Constitution required the issuance of a warrant or judicial order before the commencement of the clean-up of the plaintiffs' property, but reserved its final ruling until after the a full evidentiary hearing on the reasonableness of the city's action and whether the city complied with the Indiana Unsafe Building Statute.

Before the state court had rendered final judgment, the plaintiffs filed their federal complaint in the Northern District of Indiana, commencing the litigation that is the subject of the

present appeal. In Count I of the complaint, the plaintiffs asserted that the City of Elkhart, the Elkhart Health and Sanitation Commission, and city employees violated the plaintiffs' Fourth and Fourteenth Amendment rights by commencing the clean-up without having obtained a judicial warrant. In the Count II, the plaintiff Sophie Starzenski claimed that the defendants violated her Fourth Amendment rights alleging she was arrested without probable cause and with excessive force. She also asserted that employees of the Elkhart Health and Street Department conspired with the Elkhart Police department to have her arrested without probable cause, and that defendant Captain Larry Kasa without probable cause ordered Officer Hill to arrest her. The defendants moved for federal court abstention, pending final judgment in the state court proceedings; the district court declined the request to stay the federal action.

In November 1994, the Elkhart Superior Court entered final judgment concluding that the city did not violate the United States Constitution or Indiana law in removing the trash on February 8, 1993. The Starzenskis appealed the state court decision to the Indiana Court of Appeals.

The plaintiffs filed a motion in district court to stay the federal proceedings pending an appeal of the state court decision. The district court denied the motion and in February 1995 the court granted the defendants summary judgment, finding that the state court decision barred Count I of the plaintiffs' complaint under the doctrine of claim preclusion. The court also granted summary judgment to the defendants on Sophie Starzenski's unlawful arrest claim because the arresting officer, Sergeant Hill, had since deceased and thus had been dismissed from the case by a higher authority. Plaintiffs appeal.

II. ANALYSIS

A. Claim Preclusion on Count I

The plaintiffs' claim in Count I of the federal complaint was that City Officials had violated the Fourth Amendment in entering their property without a warrant in order to remove the trash and debris from the premises. The state court (after a hearing to determine the propriety of an injunction to prevent the clean-up) ruled that neither the United States Constitution nor Indiana law had been violated as a result of the clean-up. The district court found that the state judgment barred the federal suit.

On appeal, the plaintiffs argue that the district court, instead of dismissing the case, should have stayed the proceedings pending the plaintiffs' appeal of the state court judgment, in case the state judgment was reversed by an Indiana Appellate Court (or the Supreme Court of the United States).[2]

The parties' dispute thus centers upon how a federal district court should dispose of a case after a parallel state proceeding

---

2. At the time the instant appeal was filed, the plaintiffs had appealed the Elkhart Superior Court's ruling to the Court of Appeals of Indiana, but that court had not yet ruled on the case. Subsequent to the filing of the instant appeal, on January 10, 1996, the Court of Appeals of Indiana affirmed the Elkhart Superior Court's ruling in an opinion to be published. On February 7, 1996 the plaintiffs filed a petition to transfer the case to the Indiana Supreme Court; this petition is currently pending. Therefore, although the state litigation has advanced one step further, the Elkhart Superior Court's judgment is still in place, and the plaintiffs continue to pursue state remedies attempting to reverse that judgment. Thus, the issue before us remains the same.

has reached judgment in a court of original jurisdiction, and the parties to date have not exhausted all their appellate opportunities.

Title 28 U.S.C. § 1738 provides that "[state] judicial proceedings . . . shall have the same full faith and credit [in United States courts] as they have by law or usage in the courts of [the] State . . . from which they are taken." Thus, under section 1738, we turn to Indiana law to determine the preclusive effect of its own judgments. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985); *Lolling v. Patterson*, 966 F.2d 230, 235 (7th Cir. 1992).

Indiana Law provides two separate doctrines under which a prior judgment bars litigation in a subsequent case: claim preclusion and issue preclusion. *Watson Rural Water Co. v. Indiana Cities Water Corp.*, 540 N.E.2d 131, 135 (Ind. Ct. App. 1989).[3] Claim preclusion bars "a subsequent action *on the same claim* between the same parties or those in privity with them." *In Re Marriage of Moser*, 469 N.E.2d 762, 765 (Ind. Ct. App. 1984) (emphasis in original; footnote on-dotted).

Issue preclusion bars the relitigation of "a *particular issue*, which was adjudicated in [a] prior action." *Moser*, 469 N.E.2d at 765 (emphasis added). For issue preclusion to apply,

---

3. Indiana courts occasionally call these doctrines "estoppel by judgment" and "estoppel by verdict" respectively, *Watson* 540 N.E.2d at 135. Some courts use the phrase "*res judicata*" only to mean "claim preclusion." *See generally* 18 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 4402, at 6 (1981) (discussing the varying terminology used to describe these doctrines). For clarity we will use "claim preclusion" and "issue preclusion."

however, the issue in the subsequent case must have been "actually litigated and determined" in the prior litigation. *Id.* at 766. In other words, the determination of the issue must have been essential to the court's determination in the prior action. *Watson*, 540 N.E.2d at 137. If the plaintiffs had a "full and fair opportunity" to litigate the issue, any party may use the prior litigation as a bar against the plaintiffs' relitigation of that issue in a subsequent proceeding. *Sullivan v. American Casualty Co.*, 605 N.E.2d 134, 139 (Ind. 1992).

Count I of the plaintiffs' complaint filed in the district court claimed that the defendants violated the Fourth Amendment by entering upon the plaintiffs' premises without a warrant and seizing personal property. Prior to the district court's reaching the merits of this claim, the Elkhart Superior Court determined that city officials' entry onto plaintiffs' property in order to clean trash and debris without a warrant was constitutional. Thus, the Fourth Amendment issue was 'fully litigated and decided' by the state court. Therefore, the plaintiffs' Count I claim is barred by issue preclusion.

Although the claim is barred by issue preclusion, the plaintiffs nevertheless argue that the district court should have stayed the proceedings and refrained from ruling until all state court appeals had been exhausted. They argue that under Indiana law, if the Elkhart Superior Court's judgment in favor of the defendants is reversed, the judgment will not have any preclusive effect on collateral proceedings and, thus, the plaintiffs could have proceeded with their suit for damages in federal court.

Because the preclusive effect of a state judgment in a collateral federal case is governed by state law, *Marrese*, 470

U.S. at 380-81; *Lolling*, 966 F.2d at 235, we must look to Indiana law to determine whether we should give preclusive effect to a case that has reached final judgment in a trial court and which is currently being appealed. *See Rogers v. Desiderio*, 58 F.3d 299, 301-02 (7th Cir. 1995) (applying the principle that state law controls the preclusive effect of a judgment to a situation where a judgment was on appeal within the state system, but granting a stay because Illinois law was not clear on this point).

Indiana law provides that a pending appeal does not undermine the force of a judgment. *Pollard v. Superior Court of Marion County*, 122 N.E.2d 612, 617-18 (Ind. 1954). More specifically, "an appeal from the judgment of the trial court does not have the effect of vacating the judgment of the trial court. . . . [and] [s]uch judgment is in full force and effect until it is reversed, and is binding on the parties as to every question decided." *Jones v. American Family Mutual Ins. Co.*, 489 N.E.2d 160, 166 (Ind. Ct. App. 1986) (quoting *Daugherty v. Daugherty*, 83 N.E.2d 485, 486 (Ind. Ct. App. 1949)). The fact that the plaintiffs appealed the case and now seek transfer to the Indiana Supreme Court, does not undermine the preclusive effect of the Elkhart Superior Court's judgment on issues actuary decided. It is true that "a judgment which has been reversed on its merits cannot have any claim precluding effect [in subsequent cases]." *Koors v. Great Southwest Fire Ins. Co.*, 538 N.E.2d 259, 261 (Ind. Ct. App. 1989). However, given the Indiana rule in *Jones and Daugherty* that a judgment has full preclusive effect during the pendency of the appeal, it is clear that the rule stated in *Koors* is limited to those cases that have been previously reversed and has no bearing on cases that have the potential to be reversed. Therefore, Indiana law directs us to give preclusive effect to the judgment of the Elkhart Superior

Court notwithstanding the plaintiffs' subsequent appeal and current application for transfer to the Indiana Supreme Court.

Finally, the plaintiffs argue that federal court abstention is appropriate pursuant to *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976). Under the *Colorado River* abstention doctrine, "when the proper exceptional circumstances exist, a federal court can abstain from exercising jurisdiction and defer to the concurrent jurisdiction of a state court when there is a parallel state court action pending." *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1306 (7th Cir. 1988). Abstention is based upon considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation as well as avoiding duplicative litigation.' " *Id.* (quoting *Colorado River,* 424 U.S. at 817). District court decisions to abstain are reviewed for abuse of discretion. *Lumen Constr. Inc. v. Brant Constr. Co.*, 780 F.2d 691, 695 (7th Cir. 1985).

Abstention under *Colorado River* exists to avoid duplicative litigation; in the Starzenski's case, the state court had already rendered a final judgment. As described above, Indiana law provides that judgment of the Superior Court is entitled to final and preclusive effect. Because the state court had already rendered a decision, there was no reason for the district court to stay proceedings pending a final outcome. *See Rosser,* 864 F.2d at 1308 (staying federal litigation in personal injury lawsuit pending final outcome of state lawsuit on the same issues); *Lumen*, 780 F.2d at 696 (staying federal lawsuit pending final judgment in state court and noting that res judicata acts to prevent any conflict between final decisions of state and federal courts). Based upon this factual situation, we

hold that the district court did not abuse its discretion in declining to stay the federal court proceedings.

B. Count II: Sophie Starzenski's Claim for Unlawful Arrest

Sophie Starzenski alleges in Count II of her complaint that she was arrested without probable cause, and that Sergeant Ernie Hill used excessive force in carrying out the arrest by securing the handcuffs to her wrists too tightly. Upon Officer Hill's death, he was dismissed from the case. The remaining defendants on Count II are the City of Elkhart, Captain Larry Kasa (Hill's Supervisor), the Elkhart Health and Sanitation Department, and several Elkhart City Employees. The district court granted summary judgment for the remaining defendants because the plaintiff failed to submit evidence sufficient to create a factual issue as to whether any of the defendants were responsible for and/or participated in Hill's arrest.

In deciding whether the district court's grant of summary judgment was proper, we undertake review de novo, inquiring as to whether there is any genuine issue of material fact and whether the movants were entitled to judgment as a matter of law. *Santella v. City of Chicago,* 936 F.2d 328, 331 (7th Cir. 1991); Fed. R. Civ. P. 56(c). In making this determination, we look to the substantive law governing the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"An *individual* cannot be held liable in a § 1983 action unless he caused or participated in [the] alleged constitutional deprivation." *Wolf-Lillie v. Sonquist,* 699 F.2d 864, 869 (7th Cir. 1983). Similarly, a municipality cannot be held vicariously liable under § 1983 under a respondeat superior theory. *Monell*

v. New York City Dept of Social Services, 436 U.S. 658, 691 (1978); *Rascon v. Hardiman*, 803 F.2d 269, 274 (7th Cir. 1986). Therefore, even if Hill acted unconstitutionally, that alone could not be grounds to hold any of the other defendants liable. In order to prevail against the City of Elkhart, the Department of Health and Sanitation, or any of the individual defendants, the plaintiff must show that these defendants were directly at fault.

In order for the City of Elkhart or the Health and Sanitation Department to be held liable under § 1983, the plaintiff must demonstrate "a direct causal link between a municipal policy or custom" and the claimed constitutional deprivation. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *Cornfield v. Consolidated H.S. Dist. No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993). As the plaintiff correctly points out, a municipality can be held liable for a custom even though the body's "official decision-making channels" have not formally approved the custom. *Monell*, 436 U.S. at 691. With regard to the individual defendants, they can only be held liable if their actions caused the claimed constitutional violation. *Wolf-Lillie*, 699 F.2d at 869.

Plaintiff claims that the remaining defendants conspired to prevent her from protesting the clean-up of her property by having her unlawfully arrested. Specifically, she cites two meetings of the Health and Sanitation Commission, on December 9, 1992 and February 3, 1993. As evidence of the conspiracy, the plaintiff argues that at the December 9 meeting the Elkhart City Attorney requested that a police officer be present at the clean-up of the plaintiffs' property and further, during the meeting of February 3, the defendants agreed that the plaintiff's property would be cleaned on February 8, 1993. The plaintiff's argument is that the conspiracy ultimately led to her

arrest on February 8. Moreover, she claims that the defendants violated her lights by failing to give her notice of the meetings.

In the present case, the plaintiff has failed to present any evidence to demonstrate that any of the actions of the municipal defendants rose to the level of a constitutional violation. The unconstitutional deprivation that the plaintiff claims is arrest without probable cause. Even if she were arrested without probable cause, the actions she attributes to the named defendants did not have a causal connection to the unconstitutional arrest. The plaintiff cites the two meetings, one in which the parties agreed that a police officer should be present at the clean-up, and another in which they chose a date for the clean-up, as evidence of defendants' liability for Hill's arresting the plaintiff. However, agreeing to have a police officer present because of anticipated trouble is not unconstitutional, and the plaintiff proffers no evidence (and in fact she does not even argue) that the parties agreed to or requested that the police officer arrest the plaintiff without probable cause. Thus, the plaintiff has failed to raise an issue of material fact as to whether the individual defendants or the municipal entities caused her to be arrested without probable cause. Summary judgment, therefore, was properly awarded in favor of the defendants.

Additionally, Starzenski claims that Captain Kasa, as well as being part of the conspiracy, is responsible for and therefore liable for her unlawful arrest because he directed Hill to arrest her if she returned to the clean-up site. The district court found that there was no evidence that Officer Kasa ordered her to be arrested unlawfully, and thus the plaintiff failed to make the requisite showing to survive summary judgment.

Appendix A

Liability under § 1983 must be "predicated upon personal responsibility." *Schultz v. Baumgart*, 738 F.2d 231, 238 (7th Cir. 1984). In order to hold a supervisory official, such as Kasa, liable for the actions of his subordinate, a plaintiff must demonstrate that he "knowingly, willfully, or at least recklessly caused the alleged deprivation. . . ." *Rascon*, 803 F.2d at 274. Here, the alleged deprivation is arrest without probable cause, and therefore the narrow issue we must decide is whether the plaintiff put forward evidence sufficient to establish that Kasa caused the plaintiff to be arrested without probable cause to survive summary judgment.

Summary judgment is reviewed de novo; the standard is as follows:

> We must review the record and draw all inferences in the light most favorable to the non-movant, but a scintilla of evidence in support of the non-movant's position is insufficient to successfully oppose summary judgment; there must be evidence on which a jury could reasonably find for the plaintiff.

Lawshe v. Simpson, 16 F.3d 1475, 1478 (7th Cir. 1994) (citing *Brownell v. Figel*, 950 F.2d 1285, 1289 (7th Cir. 1991); *Anderson*, 477 U.S. at 252.

Plaintiff argues that she put forward sufficient evidence to survive summary judgment on the issue of Kasa's liability for her arrest. In support thereof, the plaintiff cites the fact that on February 8, 1993, Kasa arrived at the scene of the clean-up at Officer Hill's request and engaged the plaintiff in a discussion.

During this discussion, Kasa told the plaintiff that if she continued to create a disturbance by using abusive language and interfering with the clean-up, she would be arrested. He told her that she should either be quiet or leave. In addition, following this conversation the plaintiff left the scene. Hill's arrest report states that at that point Kasa told Hill that if the plaintiff returned to arrest her for disorderly conduct. The plaintiff returned later that day and once again yelled and cursed at the workers cleaning her property. Hill warned her not to continue disturbing the workers. Plaintiff continued to interfere with the clean-up procedure, and at this time Hill arrested her. The plaintiff argues that Kasa's actions and instructions caused Hill to arrest her without probable cause.

In support of her claim, Starzenski relies upon Officer Hill's arrest report, which merely states that "[Captain] Kasa . . . advised me that if she returned to arrest her for disorderly conduct" However, the arrest report is neither the most detailed document in the police files nor is it all the evidence the police had at their disposal when they decided to arrest her for disorderly conduct. *See United States v. Randall,* 947 F.2d 1314, 1319 (7th Cir. 1991) (observing that the "police who actually make the arrest need not personally know all the facts that constitute probable cause . . . the arrest is proper so long as the knowledge of the officer directing the arrest, or the collective knowledge of the agency he works for, is sufficient to constitute probable cause.") (quoting *United States v. Valencia,* 913 F.2d 378, 382-83 (7th Cir. 1990)). Rather Hill's arrest report is nothing but a two paragraph summary of many events that clearly does not spell out every detail of what transpired on February 8, 1993. Kasa might have said and meant, if she returns arrest her and charge her with disorderly conduct. Conversely, he could have meant if she returns and engages in

disorderly conduct, then arrest her and charge her with that offense. Importantly, Hill's arrest report also documents the fact that the plaintiff returned to the scene and at once began shouting at the workers engaged in the clean-up and acting in a disorderly manner. Hill's report stated that after she yelled at the workers he advised her to quiet down and that the plaintiff continued to yell. It was at this point that Hill arrested the plaintiff for "disorderly conduct by loud noise."

The sequence of events establishes that Hill did not arrest her immediately upon her return, but only after he directed her to quiet down and she refused and continued to yell at and interfere with the workers. It is apparent that Hill did not understand Kasa to have instructed him to arrest the plaintiff without the plaintiff's having engaged in illegal action. This is made clear by Hill's answers to interrogatories when he replied that his instructions regarding arresting the plaintiff were, "if [plaintiff] continued to interfere or disrupt the workers who were attempting to clean the premises that I was to arrest her for disorderly conduct." Thus, Starzenski has not provided sufficient evidence that Captain Kasa ordered Officer Hill to unlawfully arrest Starzenski to survive the defendants' motion for summary judgment.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF INDIANA DATED FEBRUARY 27, 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

No. 3:93 cv 401 AS

SOPHIE STARZENSKI, KAZMER STARZENSKI, and GENNIE STARZENSKI,

Plaintiffs

v.

CITY OF ELKHART, ELKHART HEALTH AND SANITATION DEPARTMENT, LEROY ROBINSON, Dir. of Health and San. Dept., RAY MINEGAR, Health Enforcement Officer, FRAN CURRY, Health Enforcement Officer, RICHARD L. MOORE, Street Comm'r, ERNIE HILL,) Elkhart City Police Officer, and LARRY KASA, Elkhart City Police Officer,

Defendants

MEMORANDUM AND ORDER

On January 26, 1995 this court granted partial summary judgment to the defendants as to Count I of the plaintiffs' Complaint, and dismissed plaintiffs Kazmer Starzenski and Gennie Starzenski. The ground for summary judgment and dismissal was to give full faith and credit to the judgment order of the Elkhart Superior Court II, which on November 10, 1994 had ruled against the plaintiffs on issues substantially the same

as those contained in Count I of their federal complaint.[1] On February 16, 1995 this court held a status call as to the remaining § 1983 (unlawful arrest/excessive force) claim in this case.

COUNT I

Although this court has clearly already ruled on Count I (*See* Order of January 26, 1995), at the status call the parties were still haggling over that issue. The plaintiffs refuse to concede that collateral estoppel applies to their Fourth Amendment and Fourteenth Amendment claims.[2] They point out the strong denunciation of the defendants' actions by Elkhart Superior Court II Judge Platt. Judge Platt called the defendants' actions "reprehensible." *Starzenski v. Elkhart*, No. 20DO29302CP107, Judgment Order (Elkhart Sup. Court II, Nov. 10, 1994) [hereinafter "Elkhart Court Order"] at 10. Judge Platt also stated that the defendants' witnesses were coached and lying, and that their testimony was "contrived and programmed." *Id.* at 11-12. Judge Platt also believed that the City suspended one worker for testifying (contrary to the coaching) that there were thefts of the plaintiffs' property during the cleanup. *Id.* at 11. There is probably no other municipality in the Northern District of Indiana which has

---

1. This case is in an unusual procedural posture. This court may not make factual findings in deciding on summary judgment, but in this case *res judicata* requires that the court respect the extensive factual findings already entered by Judge Platt.

2. "The defense of res judicata is universally respected, but actually not very well liked." *Riordan v. Ferguson*, 147 F.2d 983, 988 (C.C.A.2d 1945) (J. Clark, dissenting); *see also* Wright, *Law of Federal Courts, 4th Ed.* 678 (West 1983).

embroiled itself in as much litigation as the City of Elkhart, and that act may well portend even more.

Judge Platt carefully recounted the evidence, citing step by step the due process which had been afforded to the plaintiffs, some of which they took advantage of and some of which they did not. *See id.* at 3-5. There was notice given of hearings in the matter, at which the plaintiff appeared, presented evidence, cross examined witnesses, and extensively argued her position. *Id.* at 3-4. Judge Platt reviewed the recording of the July 24, 1991 hearing and noted that the hearing officer made clear, concise, and specific findings of fact, and clearly advised the plaintiff of her right to appeal. *Id.* at 4. Plaintiff did not appeal. The City delayed taking action to effectuate the cleanup order, and despite no legal requirement to do so, held another hearing in the matter on October 21, 1992 at which the plaintiff again appeared and argued her case. *Id.* at 4. Again, plaintiff received an adverse ruling and was advised of her rights to appeal. *Id.* at 4-5. Again, plaintiff did not appeal. Approximately three months later a written copy of the October 21, 1992 order authorizing cleanup was delivered to the plaintiff and defendants. *Id.* at 5. Soon thereafter, on February 8, 1993 the defendants commenced cleanup of the Starzenski premises.

The defendants did not advise the plaintiff of the time and date when they intended to clean her premises. The evidence demonstrated that the City intentionally did not give specific notice, so as to avoid having the plaintiff present. *Id.* at 9-10. Judge Platt did not like or approve of the City's method — but that does not make it illegal, and he found that it was not. Judge Platt believed that the City's method was unfortunate and unwise, and led to the confrontational situation, but he did not find that it violated the plaintiffs' rights.

Appendix B

Judge Platt believes that the City's previous failures to act led to a reasonable belief in the plaintiff that the City would not enforce its valid cleanup orders. *Id.* at 9. That is probably true, but irrelevant. Judge Platt certainly did *not* find that the City should have been estopped from enforcing, the valid cleanup orders. Judge Platt believes that the failure to specifically notify the plaintiff of when the cleanup would occur is what led to the "confrontational situation." *Id.* at 10. Possibly true. This court is possibly bound by that determination through *res judicata* as a finding of fact. However, it is probably true that the plaintiff, who had defied cleanup orders for thirteen years, would have defied this deadline as well and the situation might in fact have been even more explosive. Had she been on specific notice, the plaintiff almost certainly would have been waiting for the defendants on February 8, 1993, and the situation might have been worse. This court can not fault the City quite as much as Judge Platt for wanting to effectuate the cleanup without Sophie Starzenski's presence. Judge Platt, openly empathetic towards the plaintiff, found that when she came upon the scene she "became somewhat abusive to City employees and generally disrupted the progress of the City's attempt to enforce the administrative order." *Id.* at 6.

This court has reviewed the videotape of the cleanup operation, as did Judge Platt. Videotaping such operations is an excellent and indispensable practice. The scene is quite difficult to describe on paper. The court wishes to respect the feelings of Ms. Starzenski, whose situation captured on video was heart-wrenching. However, the record must be clear. Frankly, the court would not have believed and could not have appreciated the extent of such incredibly squalid conditions if not for the video evidence. The house and outbuildings were quite literally filled, in some cases to the ceilings, with a jumble

of items for which there is really no other word than refuse. That is stated with the greatest deference to Ms. Starzenski. The interior looked like a landfill. The video shows the workers picking up stacks of items that turned to dust or fell to pieces in their hands. This was *not* merely a messy house, or an overgrown collection of odds and ends. It can be described as nothing less than a health and safety hazard, however loose the Elkhart Code might be. The house as it was could not possibly have been legally inhabitable. The court is sure that there were some items of value mixed in with the mass, especially items of sentimental value to Ms. Starzenski. Her anger evident on the video was matched only by her anguish. The court has great empathy for Ms. Starzenski, who felt that all of her things were being stolen and divvied up between the workers and police. However, given all of the circumstances the court can conceive of no more reasonable way the job could have been done.

Early comments by the workers caught on video indicate that the plan was to try to divide the good from the refuse. However, they appeared to mostly give up on that — the workers cleaned out the vast mass with shovels and rakes, into a front-end loader which then dumped it into a dump truck. Under the circumstances quite frankly that might have been the only reasonable alternative. The task was truly daunting. A half dozen workers could have spent weeks sifting through the accumulated mass, separating the good from the bad. This court can not hold those workers or the City to that standard. Ms. Starzenski had thirteen years to separate the good from the refuse, and get her property in compliance with the law. For two years she had known that the City had an order permitting it to come in and clean it up. She clearly was not willing to part with anything at all, but the City of Elkhart had afforded her all due process and it had every right to haul off the accumulation without her permission.

Appendix B

The videotaped portion of Ms. Sophie Starzenski at 1015 West Garfield seems to have been of the second time she was present, after she had been to her lawyer. *See* Arrest Report by Officer Hill, Plaintiffs' Appendix D, Exhibit 38. She had been there and left earlier, and would return a third time later and be arrested. Neither the first nor third visits were videotaped. The cameraman followed Ms. Starzenski's practically every move. There was quite a mess and between six and ten workers, and she was outraged. Officer Ernie Hill (who is now deceased and thus no longer a defendant) was outside the house and prevented her from entering it. While the circumstances were inherently upsetting and perhaps disrespectful, the behavior of those actually on site, especially Officer Ernie Hill, was relatively patient and respectful towards the plaintiff. Ms. Starzenski got in the face of almost everyone present, especially Hill who stayed near her at all times, and berated them loudly and ceaselessly. Most unfortunately, the tape ended when she went across the street and into a neighbor's house, which was at some point before her arrest. Up until the point the tape ended, she was treated with considerable and respectable restraint. The tape shows neither her physically interfering with the workers nor them physically interfering with her. At some point later, things apparently took a different turn and Ms. Starzenski was arrested.

The plaintiffs point out that Judge Platt stated his belief that the City of Elkhart chose to proceed with the cleanup in a manner "calculated to deprive Plaintiff of notice and the opportunity to be present during the cleanup." Elkhart Court Order at 10. However, Judge Platt had already determined that notice of the actual cleanup and a warrant for entering the premises was not constitutionally required. *See id.* at 5. Judge Platt's comment about intentionally depriving the plaintiffs of

notice was in the context of expressing empathy with the plaintiffs' feelings, was clearly dicta, and in no way supports a constitutional claim. While Judge Platt clearly believed that the method used by the City of Elkhart was hi-handed and unwise, he also clearly held that it was not unconstitutional or illegal. Those legal and factual determinations are binding on this court in this case, not Judge Platt's personal reaction.

It is true that Judge Platt ordered any further cleanups to be preceded by sixty days notice to the plaintiffs. *Id.* at 12. However, it is apparent that he was trying to fashion an equitable compromise, taking into account what he considered the City's reprehensible cleanup behavior (and possibly taking into account the City's equally reprehensible trial behavior). *See id.* at 8, 12. Perhaps Judge Platt felt quite sorry for the plaintiffs, and/or perhaps he was punishing the defendants in a small way.[3] Judge Platt indicates that his future notice requirement is "authorized" by the administrative cleanup order. *Id.* at 8. That indicates to this court that Judge Platt felt he had the inherent power to require future notice, but the previous lack of notice was not illegal. This court interprets Judge Platt's judgment as finding entirely against the plaintiffs on the issues, but also choosing for reasons of his own to modify the administrative order as to future cleanups. The defendants may take up the matter with the Indiana Court of Appeals if they wish. Whatever the basis of his sixty-days-notice injunction, Judge Platt clearly held that there was no constitutional violation, which is the only basis of jurisdiction in this court.

---

3. Given his vitriolic comments about the defendants' trial behavior, it is a miracle he did not impose severe sanctions. This court might very well react differently to such an affront.

No one, certainly not this court, required the plaintiffs to proceed in state court with their claims. They chose to do so.[4] The state-court forum is equally capable as this court to decide federal constitutional issues. Once decided, the fight is over. This court does not sit. as an appeals court for the Elkhart Superior Court II, even on federal constitutional issues. There can be no second bite of the apple. *See Nelson v. Murphy*, No. 94-1764, slip op. at 4 (7th Cir. Jan. 4, 1995).

The plaintiffs at the status call of February 16, 1995 contended that the takings clause violation issue had not been dealt with by the Elkhart Superior Court 11, and thus was not *res judicata*. Plaintiffs contended that they raised the takings issue with Judge Platt, but he did not address it in his judgment order of November 10, 1994. It is true that no takings issue was discussed in that order. This court does not know the extent to which the issue was pressed with Judge Platt. No matter. Claim preclusion bars that claim here and now just as surely as if Judge Platt had devoted thirty pages of writing to it.

Claim preclusion prohibits this court from litigating issues which were raised or could have been raised in another court proceeding dealing with the same incident. *See* Wright, *Law of Federal Courts, 4th Ed.* 680-81; *see also* Restatement Second of Judgments, 1982, §19. "To the extent that a second action advances any part of the same claim or cause of action, an otherwise qualified judgment in the first action 'prevents

---

4. In its earlier order denying abstention this court stated: "This court warns the plaintiffs that by seeking an unreserved Indiana court final adjudication of their rights, they may well be electing to forgo their right to relitigate the same issues in a federal district court. *See England*, 375 U.S. [411, 417 (1964)]." Memorandum and Order of January 10, 1994 at 16.

litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.' " 18 Wright, Miller & Cooper, Jurisdiction §4407 p.48 (West 1981) (*quoting Brown v. Felsen*, 99 S.Ct. 2205, 2209, 442 U.S. 127 (1979)). As this court clearly stated in its memorandum and order of January 26, 1995, *res judicata* prevents re-litigation of claims based on the same operative facts dealt with by Judge Platt. Whether Judge Platt expressly ruled on the Takings issue is not relevant.

Be that as it may, the court further notes that the plaintiffs contend that they did raise the Takings issue to Judge Platt. Since it was squarely before him, and he ruled in favor of the defendants, it is inherent in Judge Platt's judgment that he found against plaintiffs on any Takings issue. If that was in error, the plaintiff's remedy lies *solely* with the Indiana Court of Appeals, and *not* this court.[5]

The court will make one final comment regarding Count I. In its order of January 10, 1994, this court declined to abstain, noting that piecemeal litigation could not be avoided since the substance of Count II here was not reflected in the state court case. This court fully expected the state court resolution to moot Count I here, but did not want to foreclose the plaintiff's unlawful arrest claim. Now, the plaintiff does not feel that Judge

---

5. If this court had to reach the merits on the Takings Clause issue, the fact that Judge Platt ruled quite explicitly and precisely that the entering of the property and hauling off of the items was a lawful act under a valid administrative order would preclude this court from finding in favor of the plaintiffs. The plaintiffs, property was adjudged a nuisance, she had been given a great deal of due process, and the City acted lawfully in going in and removing the nuisance.

Platt adequately covered all of her Count I constitutional arguments — specifically the Takings Clause issue. Asking this court to adjudicate a Takings issue based on the same facts and legal arguments raised in state court would involve exactly the kind of "piecemeal litigation" that should be avoided under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). If collateral estoppel did not moot all of Count I here, this court would amend its January 10, 1994 memorandum and order to grant abstention as to all of Count I.

COUNT II — UNLAWFUL ARREST

As this court has previously stated, the only issue left in this case is the Count II unlawful arrest/excessive force claim under 42 U.S. C. § 1983. Count II only concerns plaintiff Sophie Starzenski. She was arrested at the cleanup site by officer Ernie Hill for disorderly conduct. It was primarily Count II which led this court to refuse to abstain from this case (*See* Memorandum and Order of January 10, 1994), since the unlawful arrest issue was not being pursued in state court, the defendants relevant to Count II were not in the state-court case, and piecemeal litigation could not be avoided by abstaining. Not surprisingly, that is the issue which is left for this court to adjudicate.

It is highly unfortunate that the videotape stopped when Ms. Starzenski entered her neighbor's home. It was sometime later that she was arrested for disorderly conduct. The tape shows Officer Hill telling the plaintiff that she would be arrested for disorderly conduct if she did not leave. Plaintiffs' Reply at 4-5 *(quoting* Transcript of City Video at 9). The plaintiff acknowledges that Officer Kasa was no longer present when Sophie was actually arrested. The tape itself shows Sophie interfering with the workers' efforts, and Judge Platt

also found that to be the case (*see* Elkhart Court Order at 6). For the most part she berated them, frequently choosing an individual and advancing on him to argue, shout, and gesture. She did get physically in the way at times, and could have been considered intimidating or even threatening by those on whom she advanced since she was only barely under self-control. Although, while she told those present they would surely rot in hell, and she hoped someone did to them what they were doing to her, she did not appear to threaten anyone with personal violence while the videotape was running.

The defendants' summary judgment motion as to Count II has been fully briefed. The court first notes that Officer Ernie Hill, the arresting officer, is deceased and was dismissed from this suit on July 28, 1994. The only defendants left relevant to Count II are Officer (then Captain now Lieutenant) Larry Kasa and the City of Elkhart. The plaintiff acknowledges that *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978), precludes holding Kasa or the City liable for Officer Hill's arrest on the basis of *respondeat superior. See Patton v. Przybylski*, 822 F.2d 697, 701 (7th Cir. 1987) ("Section 1983 does not permit a suit based on a theory of superior's liability."); *see also Strauss v. City of Chicago*, 760 F.2d 765, 766-67 (7th Cir. 1985). Plaintiffs hope to hold Kasa and the City liable by showing that there was a plan or conspiracy to arrest Sophie Starzenski if she showed up at the premises. The plaintiff puts forth evidence of a "plan" to have officers present at the cleanup because they expected trouble from Ms. Starzenski. The problem with the plaintiff's evidence is that in the light most favorable to the plaintiff it only demonstrates that the City wanted police present in case trouble arose. There is nothing illegal about that, and under the circumstances it was probably most prudent. There is no evidence that had Ms. Starzenski heeded the officers' warnings, she would have still been arrested.

In order to hold the City or superiors liable under Section 1983, "official policy must have 'caused' an employee to violate another's constitutional rights." *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1099 (7th Cir. 1990) (*citing Monell*, 436 U.S. at 691-92). In this case, the "policy" (having a policeman present in case Sophie caused trouble) was itself *not* unconstitutional, and did not cause any unconstitutional treatment of Sophie Starzenski. *See Graham*, 915 F.2d at 1100; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985).[6] The videotape shows very clearly that if Officer Hill had not been present, Ms. Starzenski would have entered the premises being cleaned. It appeared quite difficult to prevent her interference with the operation. Her outrage was extreme. However empathetic the court may feel toward Ms. Starzenski, she very clearly is willing and able to cause a significant disruption. The City had been dealing with Ms. Starzenski for many years. Interestingly, the tape shows that she knew many of the workers by name.

The case against Officer Hill would have revolved around the issues of whether probable cause existed to arrest Sophie Starzenski on February 8, 1995, and whether excessive force was used. Officer Hill arrested Sophie, he is the only person charged with excessive force, and he is no longer a defendant here. There is absolutely no evidence that the City of Elkhart or Captain Kasa instructed Officer Hill to use excessive force. Therefore, there can be no finding of liability against the City or

---

6. The Supreme Court in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), created an exception from the proposition that only unconstitutional policies are actionable under § 1983. 109 S.Ct. at 1204. However, *Canton* is inapplicable here. There are no allegations or proof that the City or Kasa were deliberately indifferent or that the failure to train Officer Hill led to injuries of Sophie Starzenski.

Kasa on that claim. The only issue remaining is whether the City and/or Kasa conspired to arrest Sophie without probable cause.

Officer Kasa was not at the scene at the time of the arrest, but had been there earlier. He had spoken with Robinson, Minegar, and Hill. Officer Kasa told Sophie that, "they're going to continue their cleaning. If you — are you gonna listen to me? [Sophie replies yes] If you continue to make noise, and yell, and scream, or get in their way, you're gonna go to jail." Plaintiffs' Reply at 6-7 (*quoting* Transcript of City Video at 19). Sophie replied, "I am going to go to jail —," to which Kasa replied, "The best thing for you to do . . . The best thing for you to do is just stand back and watch or else just leave." *Id.*

It is interesting to note that on the video Officer Hill appears to be patient and respectful to the plaintiff, under the circumstances. In fact, in his report Officer Hill notes that when Sophie said she wanted to speak to her attorney he drove her to attorney McCaslin's office, waited for her, and then transported her to attorney Bill Cohen's. Supplemental Arrest Report, Plaintiffs' Appendix D, Exhibit 38. He wrote that he left Sophie there with the understanding that he would take her back to 1015 West Garfield to retrieve her bicycle. *Id.* Officer Hill stated in his report that later Sophie came back a third time on her bicycle and confronted the remaining City workers, shouting and cursing. *Id.* He wrote that he told her to quiet down and she did not. *Id.* Officer Hill placed Sophie under arrest for disorderly conduct. She tried to walk away and Officer Hill handcuffed her and transported her and her bicycle downtown without further incident. *Id.* The court notes that the charges were later dropped.

Appendix B

The plaintiffs' allegations against Officer Kasa would possibly be sufficient to withstand a motion to dismiss, but a motion for summary judgment requires an offer of proof. The plaintiff has sufficiently raised a question of fact as to whether Officer Kasa had anything to do with Sophie's arrest. It appears that he did participate in discussions regarding whether she would be arrested for disorderly conduct, even authorizing Officer Hill to arrest her. However, the remaining defendants did not effectuate the actual arrest, and can not be held liable for ordering or planning Sophie Starzenski's arrest, but rather only for ordering or planning her *unlawful* arrest. There is a complete lack of proof that Officer Kasa ordered her unlawful arrest, or that the City planned to have her unlawfully arrested.

In support of her conspiracy theory, plaintiff states that the minutes of the December 9, 1992 meeting of the Health and Sanitation Commission show that the City Attorney expected trouble, and requested Officer Cutler to be present at the cleanup. Officer Cutler stated he would be present, and would arrest Sophie *if he needed to*. Again, this does not support a finding, that there was a plan to *unlawfully* arrest Sophie. The video shows that Sophie arrived and the officers' and city workers' fears were reasonable and prudent.

The rest of the Plaintiffs' [Response] to the Motion for Summary Judgment as to Count II is completely irrelevant. It argues whether the City "knew" there was a warrant requirement, even though this brief was filed after Judge Platt had ruled that there was no warrant requirement. It also discusses Judge Platt's belief that city workers were programmed or lying regarding their testimony about the cleanup. That is also irrelevant as to the entirely separate (Count 11) issue of whether Officer Ernie Hill unlawfully arrested Sophie at the order of Kasa or the City.

Appendix B

There was certainly a reasonable belief that Sophie Starzenski would create a disturbance if she arrived at 1015 West Garfield during the cleanup. As the video shows, create a scene she did. She was eventually arrested, on her third visit to the property. If there was a plan to arrest her just for coming to the property no matter how she behaved (of which there is no proof), that plan certainly was not carried out. She was indulged considerably, even to the extent of receiving Elkhart Police limousine service to two different attorneys. Her arrest came only after a long day of tirades and interference against the City workers who were lawfully doing their jobs. She had been warned repeatedly, and refused to stop interfering.

The plaintiff attempts to present evidence that there was a "plan" to arrest Sophie. However, that is not the issue. The issue is whether there was a plan to *unlawfully* arrest Sophie, and whether she was in fact unlawfully arrested. The plaintiff has not put forth a shred of evidence to support that claim. She has not disputed that she ranted and berated the workers and that, while she did not physically assault them, her behavior could certainly reasonably be considered interference with their performance of their jobs. The video shows that she went after anyone who moved. Judge Platt entered a finding of fact binding on this court — that Sophie "became somewhat abusive to City employees and generally disrupted the progress of the City's attempt to enforce the administrative order." Elkhart Court Order at 6. The complete lack of evidence tending to prove that Sophie Starzenski was the victim of a *plan* to arrest her without probable cause can not survive the defendants' motion for summary judgment. Considering Sophie's behavior at the property, the City's "plan" to have an officer present was not only legal, it was imminently reasonable.

Appendix B

If Officer Ernie Hill, who actually arrested Sophie, was still a defendant in this case, Sophie *might* be able to avoid summary judgment by disputing the officer's account of what transpired and alleging that she was not behaving disorderly, or that he used excessive force. However, Officer Hill is dead. There can be no more claims against him, and *Monell v. Dept. of Social Services*, 436 U.S. 658, will not permit the plaintiff to hold Kasa or the City liable through *respondeat superior* for any constitutional violations by Hill. Kasa and the City must be shown to have independently violated the plaintiff's constitutional rights, and there is simply no proof of that. At most, the plaintiff has shown that there was a plan to arrest Sophie if the need arose. That is what the police are supposed to do, and there is nothing unconstitutional about that.

CONCLUSION

Based on the foregoing discussion, no triable issues remain in this case. The judgment ruling of the Elkhart Superior Court II collaterally estopps this court from reaching the merits of Count I. Officer Hill's death eviscerated plaintiff's Count II, and plaintiff has not put forth sufficient evidence of an unconstitutional conspiracy to hold liable Kasa or the City on Count II. Therefore, this court has no choice but to **GRANT** summary judgment to the defendants. Each party will bear its own costs. This case is **DISMISSED. SO ORDERED.**

DATED: February 27, 1995

s/ Allen Sharp
CHIEF JUDGE ALLEN SHARP
UNITED STATES DISTRICT COURT

(2)

Supreme Court, U.S.
FILED
NOV 21 1996
CLERK

No. 96-470

In The

Supreme Court of the United States

October Term, 1996

SOPHIE STARZENSKI, KAZMER STARZENSKI, and GENNIE STARZENSKI,

Petitioners,

vs.

CITY OF ELKHART, RICHARD L. MOORE, STREET COMMISSIONER, RAYMOND H. MINEGAR, CODE ENFORCEMENT OFFICER AND PRESIDENT, LEROY BERRY, JR., CITY OF ELKHART HEARING OFFICER and HEALTH AND SANITATION COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Circuit Court For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL D. EASH
Elkhart City Attorney
Counsel of Record
Attorney for Respondents
229 S. Second Street
Elkhart, IN 46516
(219) 294-5471

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

RESPONDENTS' COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Seventh Circuit correctly upheld the District Court's decision to dismiss Petitioners' federal action because the issue raised in that action had already been decided by a state court in a collateral proceeding.

TABLE OF CONTENTS

Page

RESPONDENTS' COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING PETITION 3

I. UNDER APPLICABLE LAW, THE STATE COURT JUDGMENT PRECLUDED ANY ACTION BY THE FEDERAL DISTRICT COURT 3

II. IF THIS COURT DENIES PETITIONERS' WRIT OF *CERTIORARI* IN CASE NO. 96-350, THIS PETITION IS MOOT 5

III. PETITIONERS ASK THIS COURT TO IGNORE WELL ESTABLISHED CASE LAW AS WELL AS STATUTORY MANDATE 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES CITED:

Daugherty v. Daugherty, 83 N.E.2d 485 (Ind.App. 1949) 4

Honig v. Doe, 484 U.S. 305 (1988) 5

Jones v. American Family Mutual Ins. Co., 489 N.E.2d 160 (Ind.Ct.App. 1986) 4

Koors v. Great Southwest Fire Ins. Co., 538 N.E.2d 259 (Ind.App. 1989) 4

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 7

Lewis v. Continental Banking Corp., 494 U.S. 472 (1990) 5

Lolling v. Patterson, 966 F.2d 230 (7th Cir. 1992) 3

Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373 (1985) 3, 7

Pollard v. Superior Court of Marion County, 122 N.E.2d 612 (Ind. 1954) 4

Rogers v. Desiderio, 58 F.3d 299 (7th Cir. 1995) 3

Starzenski v. City of Elkhart, et al., 87 F.3d 872 (7th Cir. 1996) 2, 5

Starzenski v. City of Elkhart, et al., 842 F.Supp. 1132 (1995) 2, 5

Starzenski v. City of Elkhart, et al., 659 N.E.2d 1132 (Ind.App. 1996) 2

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES CITED:

28 U.S.C. § 1738 7

42 U.S.C. § 1983 1

UNITED STATES CONSTITUTION CITED:

Article III 5

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

The Respondents, City of Elkhart, Richard L. Moore, Street Commissioner, Raymond H. Minegar, Code Enforcement Officer and President, Lee Roy Berry, Jr., City of Elkhart Hearing Officer, and Health and Sanitation Commission (collectively referred to as the "City"), by counsel, respectfully ask the Court to deny the Petition for Writ of *Certiorari* of the Petitioners, Sophie Starzenski, Kazmer Starzenski, and Gennie Starzenski (collectively referred to as the "Petitioners").

COUNTERSTATEMENT OF THE CASE

On February 8, 1993, the City entered onto and cleaned Petitioners' property. On that same day, Petitioners filed a complaint in state court (the "state court case") seeking a temporary restraining order prohibiting the City from continuing the clean-up of their property because the City did not have a judicial warrant. On June 11, 1993, while the state court case was pending, Petitioners filed this case for damages in the United States District Court for the Northern District of Indiana pursuant to 42 U.S.C. § 1983.

The state court case reached its conclusion before the federal case. The state trial court found that, in these circumstances, neither the Indiana Constitution nor the United States Constitution required the City to obtain a judicial warrant before entering Petitioners' property. Petitioners appealed this decision to the Indiana Court of Appeals. The Indiana Court of Appeals affirmed the trial

court's ruling. *Starzenski v. City of Elkhart, et al.*, 659 N.E.2d 1132 (Ind.App. 1996). Petitioners then petitioned the Indiana Supreme Court for transfer. The Indiana Supreme Court denied transfer. *Starzenski v. City of Elkhart, et al.*, 659 N.E.2d 1132, 1132 (Ind.App. 1996). Petitioners have recently petitioned this Court for Writ of *Certiorari* relating to the state court case (Case No. 96-350).

Based on the state trial court's decision, the City filed a motion with the District Court to dismiss the federal case on the basis that *res judicata* barred relitigation of the constitutional issues decided by the state court. Petitioners admitted before the District Court, as they do here, that the state court case would preclude the federal action if the state court case was final. They argued, however, that the federal action should be stayed pending completion of the state appeal process. On February 25, 1995, the District Court dismissed this case. At that time, the state court case was pending before the Indiana Court of Appeals.

Petitioners timely filed their appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the decision of the trial court. *Starzenski v. City of Elkhart, et al.*, 87 F.3d 872 (7th Cir. 1996). On September 23, 1996, Petitioners filed this Petition for Writ of *Certiorari* (the "Petition").

REASONS FOR DENYING PETITION

In this appeal, Petitioners concede that the doctrine of *res judicata* prevents relitigation of their claims in federal court after the state court decided their constitutional claims against them. Petition, page 5. Petitioners contend, however, that the federal district court erred when it refused to stay (rather than dismiss) the federal proceedings until all appeals of the state court case had been exhausted. Petition, page 5. For at least three reasons, this claim has no merit.

I. UNDER APPLICABLE LAW, THE STATE COURT JUDGMENT PRECLUDED ANY ACTION BY THE FEDERAL DISTRICT COURT.

The City's position on this point was clearly and effectively stated by the Seventh Circuit in the decision below.

> Because the preclusive effect of a state judgment in a collateral federal case is governed by state law, *Marrese [v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380-381 (1985)] *Lolling [v. Patterson*, 966 F.2d 230, 235 (7th Cir. 1992); *see also*, 28 U.S.C. § 1738] we must look to Indiana law to determine whether we should give preclusive effect to a case that has reached final judgment in a trial court and which is currently being appealed. *See Rogers v. Desiderio*, 58 F.3d 299, 301-02 (7th Cir. 1995) (applying the principle that state law controls the preclusive effect of a judgment to a situation where a judgment was on appeal within the state system, but granting a stay because Illinois law was not clear on this point).

Indiana law provides that a pending appeal does not undermine the force of a judgment. *Pollard v. Superior Court of Marion County*, 122 N.E.2d 612, 617-18 (Ind. 1954). More specifically, "an appeal from the judgment of the trial court does not have the effect of vacating the judgment of the trial court. . . . [and] [s]uch judgment is in full force and effect until it is reversed, and is binding on the parties as to every question decided." *Jones v. American Family Mutual Ins. Co.*, 489 N.E.2d 160, 166 (Ind.Ct.App. 1986) (quoting *Daugherty v. Daugherty*, 83 N.E.2d 485, 486 (Ind.Ct.App. 1949)). The fact that the plaintiffs appealed the case and now seek transfer to the Indiana Supreme Court, does not undermine the preclusive effect of the Elkhart Superior Court's judgment on issues actually decided. It is true that "a judgment which has been reversed on its merits cannot have any claim precluding effect [in subsequent cases]." *Koors v. Great Southwest Fire Ins. Co.*, 538 N.E.2d 259, 261 (Ind.Ct.App. 1989). However, given the Indiana rule in *Jones and Daugherty* that a judgment has full preclusive effect during the pendency of the appeal, it is clear that the rule stated in *Koors* is limited to those cases that have been previously reversed and has no bearing on cases that have the potential to be reversed. Therefore, Indiana law directs us to give preclusive effect to the judgment of the Elkhart Superior Court notwithstanding the plaintiffs' subsequent appeal and current application for transfer to the Indiana Supreme Court.

Starzenski v. City of Elkhart, et al., 87 F.3d 872, 877-78 (7th Cir. 1996).[1]

II. IF THIS COURT DENIES PETITIONERS' WRIT OF *CERTIORARI* IN CASE NO. 96-350, THIS PETITION IS MOOT.

Under Article III of the United States Constitution, a federal court, including the Supreme Court, may only adjudicate actual ongoing cases or controversies. *Lewis v. Continental Banking Corp.*, 494 U.S. 472, 477 (1990), *Honig v. Doe*, 484 U.S. 305 (1988). This case-or-controversy requirement for federal jurisdiction subsists through all stages of federal proceedings, trial or appellate. *Lewis*, 494 U.S. at 477. To sustain this Court's jurisdiction, it is not enough that the dispute was very much alive when suit was filed or when review was obtained by the Court of Appeals. *Id.* at 477-78. The parties must continue to have a personal stake in the outcome of the lawsuit, even at the Supreme Court level. *Id.* at 478.

---

[1] It should also be noted that Petitioners were aware of the possibility that their pursuit of the state court decision might prejudice them in federal court. In its Memorandum and Order of January 10, 1994, the District Court warned Petitioners as follows:

> This court warns the plaintiffs that by seeking an unreserved Indiana court final adjudication of their rights, they may well be electing to forgo their right to relitigate the same issues in a federal district court. *See England*, 375 U.S. [411, 417 (1964)].

Despite this clear and unequivocal warning, Petitioners chose to proceed in state court. *Starzenski v. City of Elkhart, et al.*, 842 F.Supp. 1132, 1140 (1995).

In the instant appeal, Petitioners argue that the District Court erred by not staying the federal action until Petitioners exhausted all their appeals of the state court case. Petition, pages 5-6. Petitioners' argument is based upon the premise that, if they won their appeal of the state court case, then the state trial court's decision would no longer preclude Petitioners' federal claim. Petition, pages 5-6.

As noted above, Petitioners have petitioned this Court for Writ of *Certiorari* not only in this case but in the state court case as well (docketed as Case No. 96-350). If this Court denies Petitioners' Writ in Case 96-350, then Petitioners will have exhausted the appellate process for the state court case. As Petitioners concede, the state court decision would then act as *res judicata* on their federal claim. Therefore, if this Court denies *certiorari* in Case No. 96-350, the instant appeal would not be a "live" case-or-controversy, this matter would be rendered moot, and Article III of the Constitution would prohibit this Court from rendering a decision on it.

III. PETITIONERS ASK THIS COURT TO IGNORE WELL-ESTABLISHED CASE LAW AS WELL AS STATUTORY MANDATE.

Petitioners admonish this Court that it "should, through the invocation of its supervisory powers over federal courts, create a nationwide rule preventing any federal district court from dismissing a federal claim as long as a companion state court decision is still in the appellate process." Petition, page 5. Petitioners advance

only one case to support this broad, sweeping position[2] and that case is not on point.[3]

In fact, all relevant authority supports the Seventh Circuit's position that, under the full faith and credit clause of 28 U.S.C. § 1738, the federal court must turn to Indiana law to determine preclusive effect of its own courts' judgments. *See, e.g., Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373 (1985); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). In other words, in suggesting that this Court make a new "nationwide rule" to allow Petitioners claim to continue, Petitioners invite this Court to disregard not only its own case law but also the clear statutory language of 28 U.S.C. § 1738. The City requests that this Court decline this invitation by denying Petitioners' Petition for Writ of *Certiorari*.

---

[2] In fact, in Petitioners' terse one and one-half pages of argument cites to only two cases *in toto*. In addition to *Ingersoll* (discussed below), Petitioners rely upon *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), for the general proposition that the decision to stay proceedings is left to the sound discretion of the District Court. Indeed, this general proposition does not even apply here because, unlike *Colorado River*, the state trial court in this case had already rendered a final decision at the time the District Court was faced with the decision to stay or dismiss the proceeding.

[3] *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680 (7th Cir. 1987) addressed whether a federal case should be stayed during the pendency of a Belgian court proceeding. The Ingersoll court explicitly noted that that situation was different from cases where the alternate forum was that of one of the states of the Union "to which, under our Constitution, we owe a special obligation of comity." *Id.*, at 685.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

PAUL D. EASH
Elkhart City Attorney
Counsel of Record
Attorney for Respondents
229 S. Second Street
Elkhart, IN 46516
(219) 294-5471